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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Proposed GTE-Bell Atlantic Merger, CC Docket No. 98-184

Dear Chairman Kennard:

On February 24, 1999, Bell Atlantic and GTE requested that the Commission grant "interim relief" that would allow Bell Atlantic to provide in-region Internet backbone services that cross LATA lines.[1] Such relief would enable GTE to transfer ownership of the assets of the former BBN Company – which GTE acquired in 1997 and operates under the name GTE Internetworking – to Bell Atlantic. The carriers ask the Commission to provide this relief by creating "a single LATA for Internetworking's existing businesses."[2] The carrier's request for relief would be granted once Bell Atlantic obtains FCC authorization, pursuant to Section 271 of the Communications Act, to enter the in-region inter-LATA market in States that account for 25 percent of the access lines in its service region. Because nearly thirty percent of Bell Atlantic's access lines are in New York, once the carrier obtains Section 271 authorization in that State, it would be permitted to provide inter-LATA service in every State in its service region. Bell Atlantic proposes to operate the Internet backbone and provide related services through a separate affiliate that complies with Section 272 of the Communications Act.

In support of their request for relief, the carriers assert that: (1) the prohibition on Bell Operating Company ("BOC") provision of inter-LATA services contained in Section 271 of the Communications Act does not apply to information services; (2) the Commission can use its legal authority to "modify" LATA lines in order to allow Bell Atlantic to provide an inter-LATA

[1] *Report of Bell Atlantic and GTE on Long Distance Issues in Connection With Their Merger and Request for Limited Interim Relief* at 11 (Feb. 24, 1999) ("*Bell Atlantic/GTE Letter*").

[2] *Id.*

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service; and (3) grant of this relief would be consistent with the Commission's established public interest standards.

The Information Technology Association of America ("ITAA") respectfully requests that the Commission deny the requested relief.[3] As explained below, Section 271 of the Act bars Bell Atlantic from providing in-region, inter-LATA information services. The Commission, moreover, lacks authority to grant what is, in effect, a request to forbear from enforcing this restriction. In any case, grant of the requested relief would not serve the public interest: the requested relief is not necessary to preserve Internetworking's role in the Internet backbone market; it would facilitate anticompetitive conduct by Bell Atlantic; and it would reduce Bell Atlantic's incentive to open its market to competition in States other than New York.

Bell Atlantic May Not Provide In-Region Inter-LATA Information Services

Bell Atlantic and GTE make a remarkable assertion. The prohibition on BOC provision of inter-LATA services contained in Section 271 of the Communications Act, the carriers assert, was designed for "traditional long distance services"[4] and, therefore, a BOC that provides an information service is not "subject to the restrictions contained in Section 271."[5]

This is nonsense. The origin of Section 271 of the Act is the "Line of Business" restrictions contained in the Modification of Final Judgement ("MFJ"). As originally adopted, the MFJ barred the BOCs from *any* business other than the provision of intra-LATA telecommunications service. Following the Triennial Review, the Decree Court lifted the blanket prohibition on BOC provision of information services, but retained the inter-LATA ban.[6] As a result, the BOCs were permitted to provide only those information services that did not cross LATA lines. Consistent with the Decree Court's decision, the BOCs generally confined their information services operations to offerings, such as voicemessaging, that can be provided on an intra-LATA basis.

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[3] ITAA is the principal trade association of the information technology industry. Together with its twenty affiliated regional technology councils, the Association represents more than 11,000 companies located throughout the United States. ITAA's members provide the public with a wide variety of information products, software, and services. Among the most significant of these offerings are Internet access and other on-line information services.

[4] *Bell Atlantic/GTE Letter* at 6.

[5] *Id.* at 7 n.4.

[6] *See United States v. Western Electric Corp.*, 767 Supp. 308, 327 (D.D.C. 1991); *see also United States v. Western Electric Corp.*, 714 F. Supp. 1, 7 (D.D.C. 1988); *United States v. Western Electric Corp.*, 673 F. Supp. 525, 603 (D.D.C. 1987).

Section 271 of the Communications Act codified the Decree's prohibition on BOC provision of inter-LATA information services. This general prohibition is subject to two carefully crafted exceptions, which allow the BOCs to provide out-of-region and "incidental" information services on an inter-LATA basis.[7] These exceptions would have been unnecessary if Congress had not codified the basic prohibition against BOC provision of inter-LATA information services. Accordingly, as the Commission has recognized, Bell Atlantic "may not provide in-region inter-LATA information services until it obtains Section 271 authorization."[8]

The FCC Cannot Forbear From Enforcing the Prohibition On Bell Atlantic Providing In-Region Information Services

Implicitly conceding that Section 271 of the Communications Act precludes Bell Atlantic from providing inter-LATA information services, the carriers next ask the Commission to forbear from requiring Bell Atlantic to comply with this restriction. The carriers, however, are met by an immovable obstacle: Section 10 of the Communications Act precludes the Commission from forbearing from the restrictions contained in Section 271 until such time, if ever, as the BOCs fulfil their obligation to open up their local markets to competition.[9]

Bell Atlantic and GTE seek to avoid this express statutory restriction by "dressing up" their petition for forbearance as a request that the Commission "modify" the existing LATA boundaries and "establish" a world-wide LATA for GTE's Internet backbone network.[10] In

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[7] *See* 47 U.S.C. § 271(a)(2)(3).

[8] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21932-33 (1996) (emphasis added). Bell Atlantic and GTE place heavy reliance on the fact that Section 3(21) of the Communications Act, added as part of the Telecommunications Act of 1996, defines an "interLATA service" as a "telecommunications" service. The Commission, however, has previously explained that "the definition of 'inter-LATA service,' which is 'telecommunications between a point located in a [LATA] and a point located outside such area,' does not limit the scope of the term to telecommunications services because . . . information services are also provided *via telecommunications*." *Id.* at 21932-33.

[9] *See* 47 U.S.C. § 160(d).

[10] *See Bell Atlantic/GTE Letter* at 7. In their March 22, 1999 opposition to Sprint's "Petition to Process Bell Atlantic – GTE Request for Relief as a Major Amendment to Application and for Issuance of Further Public Notice," the carriers asserted that they are asking the Commission to "establish," rather than to "modify," LATA boundaries because BBN has never been subject to a LATA restriction. *See Bell Atlantic-GTE Opposition* at 5 (Mar. 22, 1999). This is incorrect. Bell Atlantic is subject to long-established inter-LATA restrictions – which apply regardless of whether Bell Atlantic provides a service using facilities that it constructs or facilities that it purchases from an established provider. In either case, the Commission must – at a minimum – modify the restrictions applicable to Bell Atlantic before the carrier can provide the proposed service.

support of this request, the carriers first assert that, acting pursuant to the MFJ, the Decree Court altered LATA lines in a similar manner. The carriers further claim that, pursuant to the Telecommunications Act of 1996, the Commission has unfettered authority to modify LATA boundaries – so long as any new LATA is within a "contiguous geographic area."[11] The creation of a world-wide LATA, the carriers insist, would not violate this restriction. These contentions cannot withstand scrutiny.

The Decree Court's administration of the MFJ does not provide precedent for the requested relief. Under the MFJ, the Decree Court had broad authority to alter or lift restrictions that the Court determined were no longer in the public interest.[12] In some cases, the Decree Court modified geographic restrictions contained in the Decree; in other cases, the court eliminated them outright. In no case, however, did the Decree Court create a world-wide LATA.

While Congress transferred the administration of the inter-LATA restrictions to the Commission, it only empowered the agency to make limited modifications to the LATA lines adopted in the MFJ.[13] Congress expressly deprived the Commission of the authority to forbear from enforcing the inter-LATA prohibition.[14] As the Commission has recognized, the creation of a "large-scale" LATA "would effectively eliminate LATA boundaries."[15] Such relief, the agency has further recognized, is "functionally no different" than a request that the Commission forbear from the requirements of Section 271.[16] The Commission, therefore, cannot grant the relief requested by Bell Atlantic and GTE.

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[11] *Bell Atlantic/GTE Letter* at 9 (quoting 47 U.S.C. § 153(25)).

[12] *See United States v. American Tel. & Tel.*, 552 F. Supp. 131, 232 (D.D.C. 1982) *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[13] *See* 47 U.S.C. § 153(25)(B). The suggestion that a world-wide LATA meets the regulatory requirement that any new LATA be limited to a "contiguous geographic area" is so devoid of merit as to obviate the need for a response.

[14] *See id. at* § 160(d).

[15] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, CC Docket No. 98-147, at ¶ 81 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

[16] *Id.* In their letter, Bell Atlantic and GTE suggest that prior modifications to LATA boundaries made by the Commission provide ample precedent for their requested "modification." *See Bell Atlantic/GTE Letter* at 9 nn.10 & 11. Neither of the instances cited by the carriers, however, authorized a BOC to provide inter-LATA services on a large scale much less a world-wide basis. Rather, in one instance the Commission approved a limited LATA boundary modification in order to permit a BOC to use equipment located in one LATA to provide ISDN services in another LATA. *See Southwestern Bell Tel. Co. Petition for Limited Modification of LATA Boundaries to Provide ISDN at Hearne, Texas*, NSD-LM-97-26, DA 98-923 (Com. Car. Bur. Rel. May 18, 1998). In the other instance, the Commission has *proposed* to permit limited LATA boundary modifications necessary to provide users in rural areas

The Bell Atlantic-GTE Request Does Not Satisfy The Commission's Established Standards

Even if the Commission had the power to grant the requested relief, it should not do so. Under the Commission's existing standards, the agency determines the merits of a request to "modify" existing LATA lines by weighing three factors: the need for the modification; the potential risk that the modification would facilitate anticompetitive conduct by the BOC; and the impact that the modification would have on the BOC's incentive to open its local market to competition.[17] The Bell Atlantic-GTE proposal fails all three parts of the test.

Grant of the request relief is not necessary. Bell Atlantic and GTE place heavy reliance on the need to preserve Internetworking as a participant in the Internet backbone market in order to prevent the "Big Three" participants (AT&T, MCI WorldCom, and Cable & Wireless) from obtaining an "oligopoly."[18] ITAA recognizes the important role that Internetworking plays in the Internet backbone market. Any decision that the Commission makes should allow Internetworking to continue to operate and, in particular, should not disturb existing customer relationships. Grant of the requested relief, however, is not necessary to achieve these goals. For example, GTE could sell its Internet backbone network and customer relationships to a third party – just as WorldCom did in connection with the MCI merger. Or GTE could spin Internetworking's assets off into a separate business and merge all of its remaining assets into Bell Atlantic. According to GTE, these Internet assets enabled BBN to become "one of the nation's leading providers of Internet access and value added services" prior to its acquisition.[19] There is no reason why they could not provide the foundation for a similarly viable business now.[20]

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with access to advanced telecommunications services. *See Advanced Services Order* at ¶ 194. These limited modifications provide no precedent for the wholesale elimination of LATA boundaries proposed by Bell Atlantic and GTE.

[17] *See Advanced Services Order* at ¶ 190.

[18] *Bell Atlantic/GTE Letter* at 5. GTE's claim that these companies constitute the "Big Three" in the backbone service market with the potential to exercise oligopoly power is unsubstantiated. *See Federal-State Joint Board on Universal Service*, Report to Congress, FCC 98-67, CC Docket No. 96-45 at ¶ 63 (rel. April 10, 1998) (noting the existence of several Internet backbone providers); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, CC Docket No. 97-211 at ¶ 154 (rel. Sep. 14, 1998) (noting the existence of "numerous" Internet backbone providers).

[19] *GTE Completes Acquisition of BBN,* Press Release at 1 (rel. Aug. 15, 1997).

[20] The carriers claim that allowing Bell Atlantic to take over Internetworking would allow Internetworking to "draw on Bell Atlantic's existing market channels and customer relations." *Bell Atlantic/GTE Letter* at 6. This assertion does not demonstrate that approval of the request is necessary. Indeed, it does not even demonstrate that it is desirable. At bottom, the carriers are simply asserting that grant of the requested relief would benefit

Grant of the requested relief would promote anticompetitive conduct. Contrary to Bell Atlantic and GTE's assertion, requiring them to provide Internet backbone service through a Section 272 separate affiliate would not cause the "risk of anti-competitive conduct to [be] effectively non-existent."[21] While structural separation is the most effective means to deter and detect BOC anti-competitive conduct, experience under the Commission's *Computer II* regime demonstrates that it is far from fail-safe.[22] Were it otherwise, Congress would have allowed immediate BOC entry into all markets, subject to structural separation. Congress, however, declined to do so. Rather, the legislature recognized that the BOCs must first open their markets to competition, thereby dissipating a portion of their market power, *before* being allowed to enter competitive markets through a structurally separate affiliate.

Grant of the requested relief would decrease Bell Atlantic's incentives to open its market to competition. In adopting the Telecommunication Act, Congress determined that the most effective means to create an incentive for the BOCs to open their markets to competition is to require them to do so before being allowed into the inter-LATA market. As the Commission has recognized, large-scale LATA relief of the type requested by Bell Atlantic and GTE "could effectively eviscerate Section 271 and circumvent the pro-competitive incentives for opening the local market to competition that Congress sought to achieve."[23]

The fact that the proposal would not go into effect until Bell Atlantic obtains FCC authorization to enter the in-region inter-LATA market in States that account for 25 percent of the access lines in its service region does not provide a sufficient incentive for Bell Atlantic to open its entire market to competition. Bell Atlantic has made clear that it will continue to seek approval to enter the inter-LATA market in New York State – which accounts for nearly thirty percent of the access lines in the Bell Atlantic region.[24] If Bell Atlantic demonstrates that it has fully opened its market to competition in New York, the Commission should allow it to provide inter-LATA services in that State. Under Bell Atlantic's proposal, however, if the carrier makes the required showing in New York State, it will be permitted to provide inter-LATA service

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Internetworking by allowing Bell Atlantic to use its monopoly power in the local exchange market to buttress Internetworking's position in the highly competitive market for Internet backbone services. The Commission should decline to do so.

[21] *Id.* at 10.

[22] *See Investigation into Southern Bell Tel. and Tel. Company's Trial Provision of Memory Call Service*, Docket No. 4000-U (Ga. PSC, June 4, 1991); *Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992), *aff'd sub nom. Georgia PSC v. FCC*, No. 92-8527 (11th Cir. Sept. 22, 1993).

[23] *Advanced Services Order* at ¶ 82.

[24] *See Statistics of Communications Common Carriers*, Industry Analysis Division, Federal Communications Commission at 13, 20 (rel. Dec. 5, 1997).

anywhere in its region. This is unacceptable. The Commission cannot grant a region-wide waiver on the basis of the quintessentially New York assumption – made famous by Frank Sinatra and apparently embraced by Bell Atlantic – that "If I can make it there, I can make it anywhere."

Nor is the two-year limit likely to provide any real compliance incentive. There is little doubt that, if Bell Atlantic has not obtained inter-LATA authority in every State in its service region within two years, the carrier will seek an extension – in which it will argue that it will be disruptive and inefficient to remove its authority to provide Internet backbone services. The Commission would be hard-pressed to reject this argument.

Promoting the continued growth of the Internet, and fostering the introduction of local competition, are critical goals for the Commission. ITAA is grateful for the numerous pro-competitive actions taken on both fronts by the Commission. ITAA urges the Commission to "stay the course" by denying the request to allow Bell Atlantic to provide Internet backbone service before it has opened its local market to competition.

Please feel free to contact either of us if you have any questions.

Sincerely,

Jonathan Jacob Nadler/BJM

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Counsel for the Information Technology
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